INDEX.

AUTHORITIES CITED.

THE STATUTES.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 134.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

THE CHASE NATIONAL BANK.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The United States brought suit in the District Court for the Southern District of New York to recover $3,571.47 paid to the defendant, the Chase National Bank, by the Treasurer of the United States upon a forged Treasury draft. Judgment for the defendant in the District Court was affirmed by the Circuit Court of Appeals. The United States sued out this writ of error.

THE FACTS.

The instrument in question was dated December 15, 1914, and purported to be drawn on the Treasurer of the United States by Lieutenant E. V. Sumner, as acting Quartermaster of the U. S. Army at Ft. Ethan Allen, near Burlington, Vermont, payable to his own order and endorsed by him in blank. It was presented, on the day it bore date, to the Howard National Bank, in Burlington, Vt., by one John A. Howard, a finance clerk in the office of the Quartermaster at Ft. Ethan Allen, who had forged Sumner's signature as drawer and endorser (R. 17–21).

Prior to October 20, 1914, the Howard National Bank had frequently cashed such checks on the Treasurer of the United States drawn by Sumner as Acting Quartermaster. The last check prior to the one in question had been drawn by Sumner on October 20th, and thereafter Captain Wilson G. Heaton was Quartermaster at Ft. Ethan Allen and as such drew checks upon the Treasurer (R. 16).

The Bank, knowing all these facts, paid Howard the amount of the check without making any inquiry as to his authority to receive it and without requiring him to endorse it. It endorsed the check in blank with the usual guaranty of indorsements and forwarded it to the defendant for collection and deposit (R. 21).

The defendant received the check in the usual course of business on December 16, 1914, and credited the account of the Howard National Bank with the amount for which it was drawn (R. 21). At the same

time, pursuant to an arrangement between it and the government, of whose funds it was a depositary (R. 17), the defendant charged the plaintiff's account with the same amount, stamped it "Received Payment" and forwarded it to the Treasurer of the United States. The Treasurer received the check thus stamped on December 17, 1914, and on the following day credited the defendant with this amount in its books of account (R. 22).

The forged instrument purporting to be the check of Lieut. Sumner as Acting Quartermaster overdrew his account with the Treasurer, and on December 24, 1914, the Treasury Department notified Lieut. Sumner of that fact, and asked for an explanation. He replied that his clerk Howard was on a furlough and that he would reply to the inquiry as soon as Howard returned. On December 29, 1914, the plaintiff by telegraph requested Lieut. Sumner to expedite the matter. The latter then investigated his accounts, discovered the forgery, and notified the Howard National Bank thereof on December 31, 1914. The Howard National Bank thereupon advised the defendant of the forgery in a letter dated December 31, 1914, which was received January 2, 1915 (R. 23).

Between December 16, 1914, and the time of the discovery of the forgery, the Howard National Bank had at all times on deposit with the defendant more than the amount of the check on which Sumner's signatures had been forged (R. 22).

THE STATUTES.

The following statutes are deemed to be material to the determination of the issues of this suit.

Sec. 9 (3) of the Uniform Negotiable Instruments Law, in force at the time of the transactions here involved in Vermont, New York and the District of Columbia provides as follows:

> Sec. 9. When payable to bearer. The instrument is payable to bearer * * *
>
> (3) When it is payable to the order of a fictitious or non-existing person, *and such fact was known to the person making it so payable.*

Revised Statutes Sec. 3620 provides, so far as is material here, that—

> It shall be the duty of every disbursing officer having any public money entrusted to him for disbursement to * * * draw for the same *only in favor of the person to whom payment is made.*

THE CONTENTIONS OF THE PARTIES.

This is in substance an action for money had and received wherein plaintiff, having paid the check in question under the mistaken belief that it was a genuine instrument, seeks to recover the amount so paid, as money paid under a mistake of fact which the defendant ought not, in equity and good conscience, to retain.

The defendant while recognizing the general principle thus invoked contends that this case does not fall within it, but rather within the special rule that one who has paid a check drawn upon him cannot

deny the genuineness of the drawer's signature. It contends that this rule is inflexible and admits of no exceptions; that it must be applied no matter how inequitable may be the result of its application to the circumstances of any particular case; that the rule was so laid down by Lord Mansfield in *Price* v. *Neale*, 3 Burr. 1354, the leading case on the subject and has been the law ever since.

The plaintiff contends that the rule in *Price* v. *Neale* applies only where the defendant is himself entirely free from fault; that it is inapplicable where, as here, the defendant, or the Howard National Bank, in whose shoes the defendant stands, by its negligent acts and omissions contributed to the success of the deception, and has not acted to its detriment in reliance on the fact that the drawee has paid the check.

If the defendant is not liable to plaintiff because of the forgery of the drawer's signature then certainly, plaintiff insists, defendant is liable on its guaranty of the payee's endorsement. To defendant's contention that the check is payable to bearer because the nominal payee was not intended by the forger to have any interest in it and hence was a fictitious person within the meaning of the Negotiable Instruments Law, plaintiff replies that if the defendant insists that Sumner's signature as drawer must be regarded as genuine for the purposes of its defense, since he is the designated payee such payee can not be considered fictitious and therefore the check is not payable to bearer. Plaintiff replies further that under the Negotiable Instruments Law a negotiable

155739—20——2

instrument is payable to a fictitious payee only when the person making it so payable did not intend that the nominal payee should have any interest in it, and in this case Howard's intent that the payee should have no interest in the check can not be imputed to Sumner or the plaintiff. For this reason also the check is not payable to bearer. But if it be regarded as payable to the bearer that can not avail the defendant in view of R. S. Sec. 3620 above set forth.

Finally plaintiff denies that it was negligent in not sooner discovering and notifying the defendant of the forgery and contends that even if it was negligent, that does not bar recovery in this suit because the defendant was guilty of the first negligence in cashing the check.

ARGUMENT.

I.

The plaintiff may recover of the defendant money paid the latter on a forged check since the defendant did not change its position to its prejudice in reliance on the fact of payment and since its indorser was guilty of acts of negligence contributing to the success of the forgery.

The question whether the plaintiff is entitled to recover in this action must be considered as if this were a suit between plaintiff and the Howard National Bank, hereinafter referred to as the "Bank." There are no greater equities in favor of the defendant than there are in favor of that Bank. The defendant claims that because the check was sent it for collection and deposit to the account of that Bank and because the

defendant, prior to the discovery of the forgery, credited the Bank with the amount of this check, notified it of this credit, and paid it various sums in excess of the amount to the credit of the Bank with defendant either at the time or immediately after the time it credited the amount of the check to the Bank, it became a *bona fida* purchaser of the check for value. But the law recognizes no such thing as a holder in due course of a negotiable instrument void in its inception because of the forgery of the drawer's signature. Therefore the defendant merely stood in the shoes of the Bank. If plaintiff is permitted to assert as against the latter that the drawer's signature was forged, he may also do so against the defendant.

As between plaintiff and the Bank it is clear that the circumstances of this case bring it not within the rule that one who has paid a check drawn upon him cannot deny the genuineness of the drawer's signature, but within the exceptions to it.

On December 15, 1914, one Howard, a finance clerk in the office of the Quartermaster of the United States Army at Ft. Ethan Allen, near Burlington, Vermont, presented to the Bank a check purporting to be drawn on the Treasurer of the United States by one Lieutenant E. V. Sumner, as acting Quartermaster at Ft. Ethan Allen, payable to his own order and endorsed by him in blank. The Bank must have known that for almost two months prior to the presentation of this check Captain Heaton and not Lieut. Sumner had been acting as Quartermaster at

Ft. Ethan Allen, and as such had been signing all checks that were drawn by that office on the Treasurer of the United States. This circumstance alone should have aroused its suspicion as to the authority of Howard, whom it knew to be a clerk in the office of the Quartermaster, to cash the check. The slightest investigation on its part would have disclosed that the check was a forgery; but it paid the money to Howard without attempting any investigation of his authority to receive it and without requiring his endorsement.

It is true that Howard's endorsement on the check was not necessary for negotiation; but the custom of bankers, so universal that this Court will take judicial notice of it, requires a person receiving payment of a check or draft to endorse his name on it as a form of receipt and as a means of identification. Morse, Banks and Banking, 5th Ed. Sec. 391. This is especially true where the check is being cashed by a bank on whom it is not drawn.

The check when presented to the treasurer of the plaintiff showed no indorsements intervening between that of Sumner and the bank. The treasurer was justified, therefore, in believing that the money had been paid to Sumner in person. Under these circumstances the bank's guaranty of Sumner's endorsement amounted to a representation that it knew it to be genuine. Since his signatures as drawer and endorser were indistinguishable such a guaranty could not but allay any suspicion plaintiff might have as to the genuineness of his signature

as drawer. It certainly amounted to a statement that the bank did not intend to call on the Treasurer to verify the signature. Had Sumner not actually signed this check as drawer, its endorsement by him would have been an adoption of the signature as payee. The treasurer could not believe that the bank which cashed the check would endorse it and guarantee a prior endorsement without assuring itself that the signature guaranteed by it was genuine. Had plaintiff been doubtful of the signature it might well rely upon that guaranty as evidence that the drawer's signature was genuine. This is sufficient to defeat defendant's claim.

Further, had Howard's endorsement appeared on the check, the plaintiff would have had notice that the money had not been paid to Sumner directly and the case might have called upon it to scrutinize the drawer's signature with more care. Therefore, defendant's endorser by its conduct concealed from the plaintiff facts which it knew and which were calculated to have affected materially the plaintiff's conduct had they been known to it, and gave to it evidence that the Sumner signature was genuine. Under these circumstances the remarks of the Court in *Danvers Bank* v. *Salem Bank*, 151 Mass., 280, 283, in which the facts were quite similar to those of the case at bar, are strikingly applicable that:

> To entitle the holder to retain money obtained by a forgery, he should be able to maintain that the whole responsibility of determining the validity of the signature was placed

> upon the drawee, and that the vigilance of the drawee was not lessened and that he was not lulled into a false security by any disregard of duty on his own part, or by the failure of any precautions which, from his implied assertion in presenting the check as a sufficient voucher, the drawee had a right to believe he had taken.

To the same effect are *Ford & Co.* v. *Bank*, 74 S. C. 180; *Peoples Bank* v. *Franklin Bank*, 88 Tenn. 299; *Greenwald* v. *Ford*, 21 S. D. 28; *McCall* v. *Corning*, 3 La. Ann. 409; *Farmers National Bank* v. *Farmers & Traders Bank*, 159 Ky. 141; *Canadian Bank of Commerce* v. *Bingham*, 30 Wash. 484; *National Bank of N. A.* v. *Bangs*, 106 Mass. 441; *Williamsburgh Trust Co.* v. *Tum Suden*, 120 App. Div. 518; *Ronvant* v. *San Antonio National Bank*, 63 Tex. 610.

The general rule that money paid under a mistake of fact may be recovered, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund, has been modified in the class of cases under consideration only to the extent that where the mistake is that of a drawee in failing to discover the forgery of his drawer's signature, he can not recover where the person receiving the money has been free from negligence, or affirmative action, contributing to the success of the deception.

The reason assigned for the exceptional rule is that the drawee is bound to know the signature of one who draws upon him. Since he is supposed to have the

means of detecting a forgery his failure to do so is regarded as negligence as a matter of law. This rule was first laid down before the doctrine became established that one who pays money under a mistake of fact may recover it though he was negligent in not knowing the facts if the payee has not changed his position to his prejudice in reliance on the payment. Its survival in spite of the growth of the latter principle is an anomaly. It has been subjected to severe criticism, its operation has been regarded as harsh, and the tendency of the courts is to confine it within narrow limits. It is held that the rule applies only where the holder is himself entirely free from fault and slight circumstances have been laid hold of to show negligence on his part so as to take the case out of the operation of the exceptional rule.

Thus it has been held that where the holder of a check has paid it to the person presenting it out of the ordinary course of business, or where the person presenting it was a stranger and the holder did not require him to be identified or where for some other reason the circumstances under which it was presented should have aroused the holder's suspicion and he failed to make inquiry as to the right of the person presenting it to receive payment, the drawee may recover from the holder of the check the amount paid upon it. *Farmers' National Bank* v. *Farmers' & Traders' Bank,* 159 Ky. 141; *Ellis* v. *Trust Company,* 4 Oh. St. 628; *First National Bank* v. *State Bank,* 22 Neb. 769; *Danvers Bank* v. *Salem Bank,* 151 Mass. 280; *Peoples Bank*

v. *Franklin Bank*, 88 Tenn. 299; *Woods* v. *Colony Bank*, 114 Ga. 683; *Newberry Bank* v. *Bank of Columbia*, 91 S. C. 294; *Canadian Bank of Commerce* v. *Bingham*, 30 Wash. 484; *Greenwald* v. *Ford*, 21 S. D. 28; *Ronvant* v. *San Antonio Nat. Bank*, 63 Tex. 610.

In the case of this check, payable by its terms to the drawer, which was presented for negotiation before acceptance or certification, a proposing endorsee and purchaser was called upon to ascertain the genuineness of his endorser. A subsequent transfer thereof by general endorsement would guarantee that the paper had been transferred by a proper and valid endorsement and he would be bound by his guaranty thereof. Especially is this so where, as in this case, the endorsements are expressly guaranteed. As endorser and drawer were one, that of necessity asserted the genuineness of the drawer.

The Chase National Bank paid the check, not in reliance upon anything done or omitted to be done by the drawee, but before plaintiff had paid the check. It acted on the Howard National Bank's conduct and endorsement and possessed only its rights. That bank acted solely in reliance on Howard's honesty, with full knowledge of facts which should have aroused its suspicions as to Howard's right to receive the money and without any investigation. Through its negligence in not requiring Howard to endorse the check, and by its endorsement, it concealed from the plaintiff facts within its knowledge calculated to arouse plaintiff's suspicions had it known them; while by guaranteeing Sumner's

signature as endorser it represented his signature as drawer to be valid. It now seeks to shift the consequences of its conduct to the plaintiff. It does this on the sole ground that plaintiff did not discover, immediately upon presentation, a forgery so clever that it escaped detection by a bank which must have known Sumner's signature and was familiar with all the circumstances.

To permit the shifting of this loss would be contrary to one of the most elementary principles of justice, that, as between two innocent parties, the loss should fall upon the one who by his confidence in the wrongdoer made the injury possible, or as the rule is sometimes stated, the loss should fall on the one whose act occasioned the injury.

It is not denied that the Chase National Bank is entirely protected by the Howard National Bank endorsement.

II.

The doctrine that a check payable to a fictitious person is payable to bearer is inapplicable.

The defendant has argued that since Howard, who drew the check, did not intend Sumner to have any interest in it, it was payable to a fictitious person, and, therefore, payable to bearer. Consequently the endorsement was not necessary to transfer title and did not guarantee Sumner's signature as endorser, and, therefore, the plaintiff could not rely upon it as evidence of the genuineness of Sumner's signature as drawer.

Assuming that a check may be regarded as payable to a fictitious person as against one who did not know that the nominal payee was intended to have no interest in it, an assumption whose unsoundness will be next demonstrated, the strength of plaintiff's argument is not affected thereby. That argument is that the plaintiff's responsibility to previous holders as to ascertaining the genuineness of Sumner's signature as drawer and promptly detecting any forgery was changed by the Bank's guaranty of his indorsement; that but for such guaranty and conduct it might have detected the forgery before paying the check. Defendant's correspondent having, before plaintiff ever saw said draft, by its negligence given the check a deceptive endorsement of genuineness, which was acted upon by plaintiff to its injury, the defendant cannot be heard to say that the plaintiff is estopped from setting up the payment of said draft under a mistake of fact and from recovering the sum so paid.

III.

The defendant is liable to the plaintiff as guarantor of the endorsements of the check.

It will not be disputed that the drawee of a check does not, by paying it, admit the genuineness of the endorsements nor that the person presenting it does by that very act guarantee their genuineness. *Leather Manufacturers Bank* v. *Merchants Bank*, 128 U. S. 26. Admittedly Sumner's endorsement was a forgery. The defendant is then in the position of one who has received payment of a valid negotiable instrument which he had obtained through a forged

endorsement. Indisputably he must return to the drawee what he has received on that check.

Defendant seeks to avoid this consequence by contending that the check was payable to bearer. It says that Howard, who drew the check, did not intend Sumner to have any interest in it; that it follows that the payee was fictitious and the check payable to bearer; therefore title passed by mere delivery and the defendant got good title to it even though the nominal payee's endorsement was forged; the endorsement being immaterial, defendant is not liable as guarantor of it.

The language of this check forbids it being considered as a check payable to bearer. It is a check made expressly payable to the order of the drawer just as much as if it were payable "to the order of myself." The claim that the payee is fictitious equally asserts that the drawer (the same entity) is fictitious. The defendant can not insist that the drawer is not a fictitious person, and that the plaintiff is estopped from so claiming and at the same time insist that he can treat the payee, who is stated in the instrument to be the same person, as a fictitious person, so as to claim that the endorsement of such payee and his guaranty thereof can be disregarded and the paper be considered as passing by delivery, and the defendant be relieved from all responsibility for his own conduct. It follows that if the defendant's contentions prevail on the first point and Sumner must be regarded as the drawer of the check,

the same person as payee of this check can not be considered as a fictitious person and the check can not be regarded as payable to bearer.

According to the common law of England and this country alike an instrument is payable to bearer only when it is payable to a payee *known by the person against whom it is sought to be enforced* to be fictitious or non-existing, and therefore is not intended by such person to have any interest in it. *First National Bank* v. *Northwestern Bank*, 152 Ill. 296; *Bank of England* v. *Vagliano Bros.*, 1891 A. C. 107; *Armstrong* v. *National Bank*, 46 Ohio St. 512; *Shipman* v. *Bank of the State of New York*, 126 N. Y. 318; *Seaboard National Bank* v. *Bank of America*, 193 N. Y. 26; *Boles* v. *Harding*, 201 Mass. 103; *Jordan Marsh Co.* v. *National Shawmut Bank*, 201 Mass. 397; *McCall* v. *Corning*, 3 La. Ann. 409.

The English Bills of Exchange Act of 1882, which provided that where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer, was construed by the House of Lords in the case of *Bank of England* v. *Vagliano Bros.* 1891 A. C. 107, as changing the law as it had existed theretofore. The decision of the Court of Appeal was reversed on that ground and it was held that the question whether a bill is payable to a fictitious payee depends upon the actual fact rather than upon knowledge on the part of the person to be charged.

In the case at bar the court below sustained defendant's contention that the check was payable to bearer on the authority of the Vagliano case. That

decision was clearly erroneous. The American Negotiable Instruments Law provides that an instrument is payable to bearer "when it is payable to the order of a fictitious or non-existing person, *and such fact was known to the person making it so payable.*" The words of the above quotation in italics were not contained in the English Act, and show clearly that this provision was intended merely as declaratory of the common law and not as a change of it. *Seaboard National Bank* v. *Bank of America*, 193 N. Y. 26; *Boles* v. *Harding*, 201 Mass. 103; *Jordan Marsh Co.* v. *National Shawmut Bank*, 201 Mass. 397; *United Workmen* v. *Bank*, 101 Kans. 369. Therefore whether this case be regarded as arising at common law or under the Negotiable Instruments Law, the Vagliano case is not applicable.

In each of the above cases the drawer was induced by fraud to make a check payable to a person who was not intended by the person who perpetrated the fraud, and who afterwards forged the payee's name, to have any interest in it. It was held that the check was not payable to bearer because the drawer did not know that the nominal payee was not intended to have an interest in it. Much more reason is there for holding that a check is not payable to bearer when the putative drawer never signed the check at all. To hold otherwise would be to say that whether or not a negotiable instrument is payable to a fictitious person depends upon the intention of one who is not a party to it and who has no authority to bind any party to it. Such a radical departure from the com-

mon law could not have been intended by the above provision of the Negotiable Instruments Law.

The authorities relied upon by the defendant are cases in which the drawer's signature was affixed to a check by an agent who was held out to the drawee as having an unlimited authority to draw checks on behalf of the drawer. It was held that under these circumstances the principal was chargeable with the knowledge of his agent that the check was payable to a fictitious person. But in the case at bar Howard was the only one who knew that the nominal payee was not intended to have any interest in the check. Since he had no authority to draw checks on behalf of either Sumner or the plaintiff, his knowledge cannot be imputed to either of them. *United States* v. *National Bank of Commerce*, 205 Fed. 433, 438.

That the check was not payable to bearer is also apparent for another reason. R. S., Sec. 3620, provides that—

> It shall be the duty of every disbursing officer having any public money entrusted to him for disbursement to * * * draw for the same *only in favor of the person to whom payment is made.*

Lieut. Sumner was a disbursing officer within the meaning of this statute and was clearly forbidden by it to draw a check payable to bearer. The Bank was chargeable with this limitation upon his authority and could acquire no rights against the Government by cashing a check payable to bearer.

In the Floyd Acceptances, 7 Wall. 666, this Court said (676):

> Whenever negotiable paper is found in the market purporting to bind the government, it must necessarily be by the signature of an officer of the government, and the purchaser of such paper, whether the first holder or another, must, at his peril, see that the officer had authority to bind the government.

If this check is to be regarded as payable to bearer the plaintiff, having paid it in ignorance of that fact, can recover the amount of it from the defendant on the ground that it paid a void instrument in ignorance of a fact which made it void. If it was not payable to bearer Sumner's endorsement was necessary to pass title to the defendant and plaintiff can recover on the guaranty. This was the result reached by the Circuit Court of Appeals for the Ninth Circuit in a case arising under very similar circumstances. *United States* v. *National Bank of Commerce*, 205 Fed. 433; 224 Fed. 679.

IV.

The plaintiff is not barred from recovery in this case by negligence in failing sooner to discover and notify the bank of the forgery.

The defendant contended below, and it is presumed that it will do so in this Court, that it was prejudiced by plaintiff's failure sooner to discover and notify the bank of the forgery; that had plaintiff acted with reasonable diligence it could have dis-

covered the forgery on the 17th or 18th of December, and Howard would then have been arrested before he had had an opportunity to dispose of the proceeds of his fraud; that owing to plaintiff's negligence the forgery was not discovered for over two weeks. More than three weeks had elapsed when Howard was arrested, and meanwhile he had spent all but $1,466 of the proceeds of the check. Such negligence, says the defendant, defeats plaintiff's right to recover in this case.

This contention is clearly unsound. The plaintiff was not negligent in paying the check on December 18th, for it is undisputed in the record that the forgery was so well done that it could not be detected by mere inspection of the drawer's handwriting, and the negligence of the plaintiff, if any, in paying the check could in no case avail the defendant, for neither the Bank nor the defendant paid out any money in reliance on the fact of payment. They had both paid the check before the plaintiff paid it. The defendant is no worse off than it would have been had the plaintiff delayed paying the check for two weeks pending an investigation of the genuineness of the drawer's signature. Had the plaintiff done this, the defendant would have had no cause of complaint, though the plaintiff had ultimately refused to pay the check. To hold otherwise would be to declare that the United States must at its peril determine on presentation the genuineness of every check drawn on it, and that any appreciable delay in doing so is negli-

gence regardless of whether such determination can as a matter of fact be made sooner.

The discovery of the forgery came about through the fact that the plaintiff on or about December 24th discovered that Sumner's account had been overdrawn and wrote to Sumner asking for an explanation. As the result of further correspondence, Sumner discovered the forgery and gave notice of it to the Bank on December 31, 1914. In the absence of evidence to the contrary, it may be presumed that the plaintiff demanded of Sumner an explanation of the overdraft as soon as it was discovered. When it is remembered that the Treasurer of the United States keeps accounts with 6000 disbursing agents whose identity is constantly changing, and that there are 800 active designated depositary banks through which checks on the Treasurer may be cashed, it is not surprising that with the vast amount of bookkeeping which the keeping of these accounts entails it sometimes takes a week to discover an overdraft on the part of one of these thousands of disbursing agents. Certainly this Court cannot say that the failure to discover the overdraft for a week was negligence as a matter of law, nor is there anything in the record to show that the Treasurer was negligent in not inquiring as to the cause of the overdraft by telegraph instead of by mail. There is, therefore, no evidence to show that the plaintiff was guilty of negligence in failing sooner to discover the overdraft or that it had not proceeded with reasonable diligence after the discovery of that fact.

But even if the plaintiff was negligent in not sooner discovering the forgery and notifying the Bank of it, that would not avail the defendant, for the reason that the Bank was itself negligent in cashing the draft for Howard under suspicious circumstances without inquiring into his right to receive the money.

The case principally relied upon to sustain defendant's contention is *Leather Manufacturers Bank* v. *Morgan*, 117 U. S. 96. In that case a depositor in the defendant bank brought an action against it to recover money paid by it on plaintiff's checks which had been forged by raising the amounts thereof. It was held that where a bank renders to a depositor a statement of his account it is the duty of the depositor to examine such statement and promptly notify the bank of errors therein, if any, in order that it may correct them, and, if necessary, take steps for its protection by compelling restitution by the forger; that his failure to do so constituted negligence; that if he had exercised reasonable care he would have discovered the forgeries, and that since his failure to discover and give notice of them to the bank was the cause of the latter's loss, he could not recover from it the money paid out by it on the forged checks. It was held, furthermore, that it was not necessary that it should appear by evidence that a benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. The court said, (p. 115) that

> As the right to seek and compel restoration and payment from the person committing the

> forgeries was in itself a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly and it may be effectively exercising it.

But in the same case the Court says (p. 112):

> Of course, if the defendant's officers, before paying the altered checks, could by proper care and skill have detected the forgeries, then it cannot receive a credit for the amount of those checks, even if the depositor omitted all examination of his account.

and the Court, at page 118, quotes with approval from *Frank* v. *Chemical National Bank*, 84 N. Y. 209, as follows:

> But where forged checks have been paid and charged in the account and returned to the depositor, he is under no duty to the bank to so conduct the examination that it will necessarily lead to the discovery of the fraud. If he examines the vouchers personally, and is himself deceived by the skillful character of the forgery, his omission to discover it will not shift upon him the loss which, in the first instance, is the loss of the bank. Banks are bound to know the signatures of their customers, and they pay checks purporting to be drawn by them at their peril. If the bank pays forged checks it commits the first fault. It cannot visit the consequences upon the innocent depositor who, after the fact, is also deceived by the simulated paper.

All the authorities which lay down the rule that it is the duty of a depositor to exercise reasonable

diligence to discover forgeries of his checks and that if the bank suffers a loss because of his negligence in failing to promptly discover and notify the bank of forgeries, the depositor can not recover money paid out upon forged checks, recognize that where the bank has itself been guilty of any acts of negligence in paying a forged check it can not receive a credit for the amount of the check. *New York Produce Exchange Bank* v. *Houston*, 169 Fed. 785, 788; *Merchants National Bank* v. *Nichols & Co.*, 223 Ill. 41, 52; *National Dredging Co.* v. *Farmers Bank*, 6 Penn. (Del.), 580, 590; *Brixen* v. *National Bank*, 5 Utah, 504; *United States* v. *National Bank of Commerce*, 205 Fed. 433, 436; *Danvers Bank* v. *Salem Bank*, 151 Mass. 280.

In the latter case a bank which had paid a forged check drawn upon it brought an action to recover of the bank presenting the check for payment the amount so paid. The defendant claimed that the plaintiff could not recover because of its negligence in not having sooner discovered the forgery and notified the defendant thereof. In disposing of this contention the court said (p. 284):

> Even if the fact that the check, when paid, reduced the amount of the deposit below that which the depositor, as it was understood between him and the plaintiff, was to keep, or if any other circumstances should have called the attention of the plaintiff to the forgery, the original fault was still that of the defendant in paying the check without proper investigation.

The plaintiff acted with entire promptitude when the forgery was discovered, and no negligence on its part has prejudiced the defendant. When the check was forwarded for redemption, it was entirely natural that the plaintiff should have been misled, and induced to allow the same in settlement without the scrutiny it would have exercised had not the defendant given currency thereto.

CONCLUSION.

For the above reasons the judgment of the Circuit Court of Appeals should be reversed and judgment entered for the appellant.

Respectfully submitted.

THOMAS J. SPELLACY,
Assistant Attorney General.

JANUARY, 1920.

LEONARD B. ZEISLER,
CHARLES H. WESTON.
Attorneys.

○

JAN 12 1920
JAMES D. MAHER,
CLERK.

No. 134.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA,
Plaintiff-in-Error,

AGAINST

THE CHASE NATIONAL BANK,
Defendant-in-Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF AND ARGUMENT FOR DEFENDANT-IN-ERROR

HENRY ROOT STERN,
Counsel for Defendant-in-Error.

SUBJECT INDEX

TABLE OF CASES AND AUTHORITIES

PAGE

STATUTES CITED

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1919.

No. 134.

THE UNITED STATES OF AMERICA,
Plaintiff-in-Error,

AGAINST

THE CHASE NATIONAL BANK,
Defendant-in-Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF AND ARGUMENT FOR DEFENDANT-IN-ERROR

STATEMENT OF THE CASE

The following omissions from and corrections of the statement of the case set forth in the brief of the plaintiff-in-error (hereinafter called the plaintiff) are, we believe, of sufficient importance to require specific mention.

The reference by plaintiff's counsel (pp. 2, 7 of his brief) to the circumstance that at the particular time in question Lieutenant Sumner was not in fact performing the duties

of quartermaster at Fort Ethan Allen is wholly without importance and his statement that the Howard National Bank knew such fact (p. 2, 7 of his brief) is not supported by the record. Lieutenant Sumner *had* been performing such duties and there is no evidence that the Howard National Bank knew of any change in that respect; the plaintiff's Treasurer did not reject the instrument or seek to reclaim the proceeds on any such ground; Sumner drew similar checks or drafts not only a short time before, but also a short time after the forgery (Transcript of Record, pp. 16-17, fols. 30-32); and finally he was authorized to draw, and it was *at that time* the *duty* of the plaintiff's Treasurer to honor such checks or drafts drawn by him (*id.*, p. 16, fol. 30).

The mere statement that First-Class Sergeant Howard was a finance clerk in the office of the quartermaster is scarcely a complete description, nor does it disclose the knowledge of him possessed by the Howard National Bank. He was one of six men who had been especially trained for such a position by the Government (*id.*, p. 21, fols. 34-35). He handled all monetary papers at the Post and acted as pay clerk to Lieutenant Sumner, and the *Howard National Bank knew him as such clerk* (*id.*, p. 21, fol. 35). When he presented the instrument in question, the Howard National Bank, knowing him to be a pay clerk of the Government and an assistant of Lieutenant Sumner (*id.*, p. 21, fol. 35), cashed it in entire good faith, paying him the full face amount thereof (*id.*, p. 21, fol. 35).

On the same day, it forwarded the instrument by mail to the defendant-in-error (hereinafter called the defendant), The Chase National Bank of New York, for collection and for deposit to its account, at the same time stamping the back with the customary indorsement (*id.*, pp. 19-20, 21, fols. 33-34, 36). It was received the next day in the usual course of business by the defendant, with which both the Howard National Bank and the Government at that

time maintained deposit accounts (*id.*, pp. 21-22, fols. 35-36). The Chase National Bank likewise acted in perfect good faith, not knowing or having any reason even to suspect that the instrument was not a genuine draft, or check, and exactly what it purported to be (*id.*, p. 23, fol. 39). On the day of its receipt, it credited the amount of the instrument to the account of the Howard National Bank, to which it gave due notice thereof (*id.*, p. 22, fol. 37)., and, at the same time, pursuant to an arrangement between it and the Government, of whose funds it was a depositary (*id.*, pp. 26-33, fols. 45-58; p. 34, fol. 60), it charged the amount thereof against the account of the plaintiff (*id.*, pp. 21-22, fol. 36), stamped the usual anticipatory receipt of payment on the back of the draft or check, as appears from the copy annexed to the stipulation of facts (*id.*, p. 20) and promptly on the same day mailed it, with a notice showing how it had been charged to the plaintiff's account, to the plaintiff's general disbursing officer, the Treasurer of the United States, at the City of Washington (*id.*, p. 22, fol. 36). Under the arrangement between the plaintiff and the defendant, the latter cashed the instrument mentioned under the same conditions and with the same rights and responsibilities as it cashed commercial checks drawn on other banks (*id.*, pp. 36-37, fols. 64-65). The Chase National Bank had asked the plaintiff whether the items forwarded by it would be promptly examined upon arrival in the City of Washington and any irregular checks returned the same day, stating that the matter was quite important to it in its relations with its correspondent banks, and also requested to be advised by wire of the non-payment, for any reason, of any check for $500 or upwards, and of the name of the last endorser (*id.*, p. 37, fols. 66-67). Evidently the purpose of this was to enable The Chase National Bank and its correspondents to take prompt steps for their own protection, in the event that any such instruments should prove to be forged or otherwise irregular. The plaintiff acknowledged the receipt of the request for advice by wire

of the rejection of any check for $500 or upwards, and stated that it was intended that the work of examining checks in the Treasurer's office should be so conducted that in case a check should be rejected, the bank from which it was received should be notified *not later* than the next day after its receipt (*id.*, p. 38, fols. 67-68). There was no further correspondence on the subject and it is evident that as a result of this correspondence the defendant was satisfied that the plaintiff would promptly and carefully examine all instruments such as that involved in this case and give *prompt* notice of any irregularities therein. The instrument in question was received in due course by the plaintiff on December 17, 1914 (*id.*, p. 22, fols. 36-37). The next day, December 18, 1914, after the plaintiff's Treasurer had had twenty-four hours in which to examine it, it was paid by crediting the amount to the defendant (*id.*, p. 22, fol. 37), after having been *actually examined* and passed as genuine (*id.*, p. 40, fols. 72-73), *although such payment caused Lieutenant Sumner's account with the Treasurer of the United States to be overdrawn* (*id.*, p. 23, fols. 38-39). *About a week later* the officials of the plaintiff's Treasury Department notified Lieutenant Sumner that his account was overdrawn and requested an explanation (*id.*, p. 23, fol. 39). *Five days later,* December 29, 1914, they telegraphed him to expedite the matter (*id.*, p. 23, fol. 39). *Thereafter*, he examined his papers and discovered that the instrument mentioned had been forged and so notified the Howard National Bank on December 31, 1914 (*id.*, p. 23, fol. 39). The Howard National Bank wrote the defendant a letter on the same day, notifying it of the forgery and the letter was received by the defendant on January 2, 1915 (January 1, 1915, having been a holiday in New York). (*id.*, p. 23, fols. 39-40; p. 39, fols. 70-71). Before receiving such notice, however, the defendant had paid the Howard National Bank and charged to its account various sums of money in excess of the amount to the credit of said bank with the defendant either at the time or immediately after

the time the defendant credited the amount of said check to said bank. (*id.*, p. 22, fol. 37). *On the same day* it learned of the forgery, January 2, 1915, defendant wrote to the plaintiff advising it thereof (*id.*, p. 23, fol. 40; p. 40, fol. 71). The plaintiff received such letter on January 4, 1915 (January 3, 1915, being a Sunday), and replied thereto on January 4, 1915, by a letter which defendant received on January 5, 1915, (*id.*, pp. 23-24; fol. 40; p. 40, fols. 72-73). In the last mentioned letter, *which contained the first word from the plaintiff to the defendant in connection with the forgery,* the plaintiff sent a photographic copy of the check to the defendant, directing the defendant to credit it with the amount of the instrument and forward the photographic copy to the Howard National Bank for reclamation. The defendant attempted to obtain the money back on the check from the Howard National Bank, but it refused to return it or to accept any of the responsibility (*id.*, p. 41, fols. 73-74). It is to be noted that, while the defendant and the Howard National Bank made the necessary book entries in respect to said instrument and forwarded it with proper instructions on the *very day* of its receipt in each instance and gave notice of any information in respect thereto on the *very day* of its receipt, the plaintiff, until after January 3, 1915, never did anything in connection with the matter without delay, although it had led the defendant to believe, as heretofore mentioned, that the examination of such instruments would be so conducted that, in case one should be rejected, the bank from which it was received would be notified *not later than* the next day after its receipt (*id.*, p. 38, fols. 67-68). If it had carefully examined the instrument and discovered the forgery and given due notice by wire on the *very day* of its receipt, December 17, 1914, as any *bank* surely would have done, the forger, it must be presumed, would have been apprehended that day in Burlington with the proceeds of the draft on his person for he did not leave Burlington till that night, the night of December 17, 1914 (*id.*, p. 44, fol. 79). Even thereafter he was traveling

around in the United States for about two weeks (*id.*, p. 44, fols. 80-81), presumably spending the money obtained on the forged instrument, and undoubtedly could have been apprehended at almost any time during that period with a very substantial portion of the proceeds on his person. Although he left the United States on January 1, 1915 (*id.*, p. 44, fol. 81), he was arrested in Winnipeg, Manitoba, on January 6, 1915 (*id.*, p. 44 fol. 81), just four days after the defendant first heard of the forgery (*id.*, p. 23, fol. 39), on information supplied, not by the plaintiff's secret service men, but by detectives employed by the American Bankers Association, of which the Howard National Bank was a member (*id.*, p. 44, fol. 81), and even at that late date there was recovered from him the sum of $1,466, the unspent portion of the proceeds of this fraud, and that sum was turned over to the plaintiff, the United States Government (*id.*, p. 44, fol. 81).

BRIEF OF THE ARGUMENT

We present the following points:

(1) A. THE DRAWEE OF A CHECK OR DRAFT IS BOUND, AT HIS PERIL, TO KNOW THE DRAWER'S SIGNATURE AND CANNOT, AFTER PAYMENT OF SUCH CHECK TO AN INNOCENT HOLDER FOR VALUE, RECOVER BACK THE AMOUNT OF SUCH PAYMENT FROM THE LATTER.

Price v. *Neal*, 3 Burr., 1354;
United States v. *Bank of Georgia*, 10 Wheat., 333;
United States v. *Bank of New York*, 219 Fed., 648;
National Park Bank v. *Ninth National Bank*, 46 N. Y., 777;
Bank of St. Albans v. *Farmers' & Mechanics' Bank*, 10 Vt., 141;
First National Bank of Belmont v. *First National Bank of Barnesville*, 58 Ohio State, 207;
State National Bank v. *Magdalena*, 157 Pac., 498 (N. Mex.);
Bergstrom v. *Ritz-Carlton Restaurant & Hotel Co.*, 171 N. Y. Ap. Div., 776;

Germania Bank v. *Boutell*, 60 Minn., 189;
Ames, 4 *Harvard Law Review*, 275.

B. THIS IS EQUALLY TRUE, EVEN THOUGH THE ENDORSEMENT OF THE PURPORTED PAYEE ALSO IS FORGED.

Postal Telegraph-Cable Co. v. *Citizens' Nat'l Bank*, 228 Fed., 601 (C. C. A., 3d Ct.);
State Bank v. *Cumberland Savings Bank*, 168 N. C., 605;
Deposit Bank of Georgetown v. *Fayette Nat'l Bank*, 90 Ky., 10;
First National Bank v. *Marshalltown State Bank*, 107 Ia., 327;
Howard & Preston v. *Mississippi Valley Bank of Vicksburg*, 28 La. Ann., 727;
Bank of England v. *Vagliano Bros.*, L. R. (1891) App. Cases, 107;
National Park Bank v. *Ninth National Bank*, 46 N. Y., 77;
National Bank of Commerce v. *United States*, 224 Fed., 679; s. c., 205 Fed., 433;
2 *Parsons on Notes and Bills*, 591;
Robinson v. *Yarrow*, 7 Taunt., 455;
Cooper v. *Meyer*, 10 B. & C., 468;
Beeman v. *Duck*, 11 M. & W., 251;
Williams v. *Drexel*, 14 Md., 566.

(2) INASMUCH AS THE INDIVIDUAL DRAWING THE INSTRUMENT DID NOT INTEND THAT THE PERSON NAMED AS PAYEE THEREIN SHOULD HAVE ANY INTEREST IN IT OR EVEN POSSESSION THEREOF, SUCH PAYEE WAS, WITHIN THE NEGOTIABLE INSTRUMENTS LAW, A "FICTITIOUS" PAYEE, AND HENCE THE INSTRUMENT WAS PAYABLE TO BEARER, AND THE INDORSEMENT SURPLUSAGE.

Transcript of Record, p. 23;
Uniform Negotiable Instruments Law, §9;
Bank of England v. *Vagliano Bros.*, L. R. (1891) App. Cases, 107;
Trust Company of America v. *Hamilton Bank*, 127 N. Y. App. Div., 515;

Snyder v. *Corn Exchange Bank*, 221 Pa. St., 599;
Bartlett v. *First National Bank*, 247 Ill., 490;
Phillips v. *Mercantile National Bank*, 140 N. Y., 556;
Clutton v. *Attenborough & Sons*, L. R. (1897) App. Cases, 90;
Coggill v. *American Exchange National Bank*, 1 N. Y., 113;
Phillips v. *Thurn*, 18 C. B. (18 J. Scott, N. S.), 694;
Kohn v. *Watkins*, 26 Kans., 691;
Ort v. *Fowler*, 31 Kans., 478;
Lane v. *Krekle*, 22 Ia., 404, 405;
Farnsworth v. *Drake*, 11 Ind., 101;
Blodgett v. *Jackson*, 40 N. H., 21;
Re Assignment of Pendleton Hardware Co., 24 Oregon, 330.

(3) THE RECORD FAILS TO DISCLOSE ANY FACTS SUFFICIENT TO JUSTIFY A FINDING THAT THE HOWARD NATIONAL BANK WAS NEGLIGENT.

Dedham National Bank v. *Everett National Bank*, 177 Mass., 392.

(4) BOTH PARTIES HAVING MOVED FOR THE DIRECTION OF A VERDICT, THE EXCEPTION TO THE FINDING OF THE TRIAL JUDGE IN FAVOR OF THE DEFENDANT DOES NOT PERMIT THE PLAINTIFF TO RAISE THE QUESTION OF THE NEGLIGENCE OF THE HOWARD NATIONAL BANK FOR REVIEW BY THIS COURT UPON WRIT OF ERROR.

Transcript of Record, p. 45, fol. 82;
Wigmore on Evidence, Vol. IV., §2552 (c), p. 3593;
Beuttell v. *Magone*, 157 U. S., 154;
Williams v. *Vreeland*, 250 U. S., 295;
Sena v. *American Turquoise Co.*, 220 U. S., 497;
Bowen v. *Chase*, 98 U. S., 254;
Martinton v. *Fairbanks*, 112 U. S., 670;
Kentucky Life & Accident Insurance Co. v. *Hamilton*, 63 Fed., 93;
Wilson v. *Merchants' Loan & Trust Co.*, 183 U. S., 121;

Lehnen v. *Dickson,* 148 U. S., 71;
Otoe County v. *Baldwin,* 111 U. S., 1, 12;
Basset v. *United States,* 9 Wall., 38, 40;
Dooley v. *Pease,* 180 U. S., 126, 131;
Hepburn v. *Dubois,* 12 Peters, 345

(5) EVEN ASSUMING THAT THE HOWARD NATIONAL BANK WAS NEGLIGENT IN CASHING THE CHECK, SUCH NEGLIGENCE COULD NOT BE CHARGED TO THE DEFENDANT BANK, WHICH WAS A BONA FIDE PURCHASER FOR VALUE.

Transcript of Record, p. 22, fol. 37;
Merchants National Bank v. *Santa Maria Sugar Co.,* 162 N. Y. App. Div., 248;
National Park Bank v. *Seaboard Bank,* 114 N. Y., 28;
Rickerson Roller-Mill Co. v. *Farrell Foundry & Machine* Co., 75 Fed., 554;
National Park Bank v. *Ninth National Bank,* 46 N. Y., 77;
Jones v. *Miners, etc., Bank,* 144 Mo. App., 428.; 128 S. W., 829;
Pennington County Bank v. *Moorehead First State Bank,* 110 Minn., 263;
Raphael v. *Bank of England,* 17 C. B., 161;
United States v. *Bank of New York,* 219 Fed., 648.

(6) THE STIPULATED FACTS SET FORTH IN THE RECORD ESTABLISH SUCH NEGLIGENCE ON THE PART OF THE PLAINTIFF AS WILL, IRRESPECTIVE OF ANY OTHER QUESTION IN THIS CASE, PRECLUDE ITS RIGHT TO RECOVERY. THE GENERAL VERDICT DIRECTED IN FAVOR OF THE DEFENDANT NECESSARILY CONSTITUTED A FINDING OF SUCH NEGLIGENCE WHICH THIS COURT WILL NOT DISTURB UPON WRIT OF ERROR.

Transcript of Record, p. 16-24, 43-45, fols. 30-40, 79-81;
Leather Manufacturers' Bank v. *Morgan,* 117 U. S., 96, 115;
Marks v. *Anchor Savings Bank,* 252 Pa., 304, 310;
Gloucester Bank v. *Salem Bank,* 17 Mass., 32;

United States v. *Central National Bank*, 6 Fed., 134;
Salas v. *United States*, 234 Fed., 842;
United States v. *Bank of New York*, 219 Fed., 648, 649.

POINT I.

A. The drawee of a check or draft is bound, at his peril, to know the drawer's signature and cannot, after payment of such check to an innocent holder for value, recover back the amount of such payment from the latter.

B. This is equally true, even though the endorsement of the purported payee also is forged.

A.

The general rule on this subject was established by Lord Mansfield, in the case of *Price* v. *Neal*, 3 *Burr.*, 1354. That case involved two forged bills of exchange which had been paid by the drawee. One of these bills had been paid, when it became due, without acceptance; the other was duly accepted and paid at maturity. Upon discovery of the forgery, the drawee brought an action against the holder to recover back the money so paid; both parties being admitted to be equally innocent. It was held that the drawee could not recover. Lord Mansfield said:

> "Here was *no fraud; no wrong.* It was incumbent upon the *plaintiff*, to be satisfied 'that the bill drawn upon him *was the drawer's hand,*' before he accepted or paid it; but it was not incumbent upon the *defendant* to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him; and he sends his servant to pay it and take it up. The other bill he actually accepts, after which acceptance the defendant innocently and *bona fide* discounts it.

> The plaintiff lies by, for a considerable time after he has paid these bills; and *then* found out 'that they were forged,' and the forger comes to be hanged. He made no objection to them at the *time* of paying them. Whatever neglect there was, was on *his* side.

The report of the case indicates strongly that the endorsements were also forged. Judge Learned Hand so analyzed it, saying (Transcript of Record, p. 14, fol. 25):

> "Indeed, from the report in Burrows it seems likely that in *Price* v. *Neal*, Lee, the forger, forged the *endorsements* along with the bill itself" (italics ours).

The principle of law established by the foregoing case has never been departed from by the courts of England, the Federal Courts, the courts of New York and the courts of the majority of the States of the Union, which not only regard it as authoritative, but expressly approve it in principle.

> *United States Bank* v. *Bank of Georgia*, 10 Wheat, 333;
>
> *United States* v. *Bank of New York*, 219 Fed., 648;
> *National Park Bank* v. *Ninth National Bank*, 46 N. Y., 77;
>
> *First National Bank of Belmont* v. *First National Bank of Barnesville*, 58 Ohio State, 207;
>
> *State National Bank* v. *Magdalena*, 157 Pac., 498 (N. Mex.);
>
> *Bergstrom* v. *Ritz-Carlton Restaurant & Hotel Co.*, 171 N. Y. App. Div., 776.

The courts of Vermont, where the check in question was drawn and negotiated, have applied precisely the same rule on this subject as those of New York and the United States. In *Bank of St. Albans* v. *Farmers' & Mechanics' Bank*, 10 Vt., 141, it was held that where a bank innocently purchases and cashes a forged check, it cannot be

compelled to repay the drawee bank the amount of money so obtained by it from the latter. The Court said (p. 145):

> *"The presentment of a bill to the drawee is a direct appeal to him to sanction or repudiate it.* It is *an inquiry* as to its genuineness, *addressed to the party, who, of all men, is supposed best able to answer it,* and whose decision is most satisfactory. He is, moreover, the *person to whom the bill itself points, as the legitimate source of information to others,* and *if he were permitted to dishonor a bill after having once honored it, the very foundation of confidence in commercial paper would be shaken.* There is a wide difference between such a transaction and the passing of paper as a representative of money, between persons equally strangers to it in the ordinary course of business. In the latter case, the receiver relies, in a measure, upon the paper, while in the former, the case is reversed, and the *holder relies,* and *has a right to rely, upon the decision of him to whom the bill is addressed,* and who alone is to determine whether it shall be honored or not" (italics ours).

There has been some difference of opinion as to the reason which is the true basis of the principle established in *Price* v. *Neal.*

On the one hand it has been urged with force that the doctrine is founded upon strong reasons of commercial policy.

See case last cited, also *Germania Bank* v. *Boutell,* 60 Minn., 189, where the Court said (p. 192):

> "The money of the commercial world is no longer coin. The exchanges of commerce are now made almost entirely by means of drafts and checks. It was largely in deference to this fact that the recovery of money paid on paper of this kind, to which the

drawer's signature was forged, was made an exception to the general rule as to the recovery of money paid under a mistake of fact."

On the other hand the late Dean of the Harvard Law School, in a very interesting and able article on this subject, has maintained that the doctrine of *Price* v. *Neal* is based upon the principle expressed in the maxim that where equities are equal the legal title shall prevail.

Ames "The Doctrine of Price v. *Neal,"* 4 Harvard Law Review, p. 297.

Whichever of the two reasons above referred to may be deemed to be the true one, it is clear that the legal consequence of the drawee's act in paying a check or draft upon which the maker's signature is forged is not dependent upon proof by the holder of negligence on the part of the drawee.

B.

The plaintiff does not dispute the principle laid down in *Price* v. *Neal* and the other authorities above cited, but contends that, because in the case at bar, the *endorsement* of the purported payee was forged as well as the signature of the purported drawer, the rule does not apply.

This contention necessarily proceeds upon the theory that the holder of a draft, payable to the order of a specific payee, in endorsing and presenting it for payment, represents either expressly or impliedly, that the prior endorsement of such payee is genuine.

Assuming the existence of such a representation, it does not absolve the drawee from his *primary* duty to repudiate the forgery of the drawer's signature.

In the following cases not only the signatures of the drawers but also the payees' endorsements were forged; yet the drawees, having paid the instruments to innocent holders for value, were not permitted, after discovery of the forgeries, to recover back from the holders.

Postal Telegraph-Cable Co. v. *Citizens' Nat'l Bank*, 228 Fed., 601 (C. C. A. 3d Ct.);

State Bank v. *Cumberland Savings Bank*, 168 N. C., 605;

Deposit Bank of Georgetown v. *Fayette Nat'l Bank*, 90 Ky., 10;

First National Bank v. *Marshalltown State Bank*, 107 Ia., 327;

Howard & Preston v. *Mississippi Valley Bank of Vicksburg*, 28 La. Ann., 727;

Bank of England v. *Vagliano Bros.*, L. R. (1891) App. Cases, 107;

National Park Bank v. *Ninth National Bank*, 46 N. Y., 77.

We submit that the case first cited, *Postal Telegraph-Cable Co.* v. *Citizens' Nat'l Bank*, 228 Fed., 601, decided in 1916 by the Circuit Court of Appeals for the Third Circuit, is, upon its facts, almost on all fours with the present case.

The fundamental difficulty with our opponent's position is that, even when both the signatures of the drawer and the endorsement of the payee are forged, the drawee is really in no worse position than if the endorsement of the payee had been genuine, in which case plaintiff does not dispute that the doctrine of *Price* v. *Neal* would be a complete bar to recovery. Even if we assume, therefore, the existence of a representation on the part of the holder that the endorsement is genuine, such representation is immaterial. The drawee is not primarily concerned with the endorsements but merely with the signature of the drawer, because, as was said in *State Bank* v. *Cumberland Savings Bank, supra*: "The drawee bank pays a check upon the faith of the genuineness of the signature of the drawer." The forgery of the *endorsement* is not the producing or proximate cause of the loss. That results immediately upon, and solely from, the honoring by the drawee of a draft bearing the forged signature of his drawer.

Hence, Judge Learned Hand, in the District Court, properly concluded that (Transcript Record, p. 13, fols. 24-25):

> "As the bill was a forgery and created no obligation, it could not make the slightest difference to the drawee what endorsements it bore, or whether or not they were genuine. The bill being void could never be presented by the true owner, assuming the payee ever became its true owner. Now, in the case of a genuine bill stolen and forged, the wrong done the drawee who pays on the forged endorsement is only that he must pay again, a wrong which cannot arise when the bill is a forgery. Hence the forgery of the endorsement was wholly irrelevant even if the bill had been stolen from the actual payee."

It was strongly urged by the plaintiff in the Court below and is suggested at pages 8 and 9 of the plaintiff's brief in this Court, that the fact that the name of the ostensible drawer of the check was identical with that of the ostensible payee, and hence endorsee, in some way distinguishes the present case from those above cited in which the ostensible maker and payee purported to be different parties. In the plaintiff's present brief, for example, it urges that

> "The Treasurer could not believe that the Bank which cashed the check would endorse it and guarantee a prior endorsement without assuring itself that the signature guaranteed by it was genuine. (Plaintiff's brief, page 9).

Exactly the same argument might be and doubtless was advanced in the cases above cited in which the maker and payee purported to be *different* persons, although both names were written on the check by the hand of the same man, viz., the forger.

In any of such cases, had the endorsee Bank assured itself regarding the genuineness of the endorsement it

guaranteed, the forgery of the signature would have also been discovered and the check never presented for payment. Notwithstanding, however, its failure to so assure itself, and the fact that the endorsement was forged, the endorsee Bank was held not liable to refund to a drawee who paid upon a forged drawer's signature.

There is another reason why this argument is fallacious. It assumes that because the same name appeared upon the face and the back of the check they must necessarily have been written by the same hand. This happens to be true in this particular case, but the argument must be tested by its general and not by its particular application. *It does not follow that because the endorsement is a forgery, the signature on the face is likewise, or vice versa.* It might very well have been that Howard, after drawing up and forging Sumner's name to the check, could have procured the latter, on some pretext, to write his own name on the back of the instrument. Such cases are by no means uncommon. Why should the Treasurer be permitted to take it for granted that because the endorsement is, or is guaranteed to be, genuine, the signature on the face is equally so, merely because the handwriting appears similar? What right has he to indulge in or rely upon loose assumptions or vague inferences when he has precise, direct means of identification in his own possession?

> "The drawee of a bill is presumed to have a better knowledge of the signature of the drawer than the holder. It is for him to rely upon his own knowledge and means of information on the subject, and not upon presumptions arising from the opinions of others." *Howard & Preston* v. *Mississippi Valley Bank of Vicksburg*, 28 La. Ann., 727, 728.

In the last mentioned case, some of the drafts involved, like the check in the case at bar, were drawn to the order of the ostensible drawer and purported to be endorsed by him. It was there urged by the drawees, as it is here urged by the plaintiff, that they were "thrown off their guard by the natural inference that the (cashing) bank

had taken the drafts directly from the" ostensible drawer.

The root of the matter is that when a check or draft is presented to the drawee, he is not, as between himself and the holder, primarily concerned with the genuineness of any signature thereon except that of the drawer, appearing upon the face. The presentment of the instrument is in itself an inquiry directed solely to him as to the genuineness of such signature and only such signature.

Let us assume, in order to test the soundness of the plaintiff's contention, that the situation was reversed, and that a bill payable to the drawer's own order and purporting to be endorsed by him in the same handwriting is, before negotiation, presented to the drawee for acceptance. If the plaintiff's contention is sound, then, logically, the acceptance of the bill would constitute a representation not only that the signature on the face thereof is genuine, but also that the *endorsement* is genuine.

This, however, is not the law.

> "If the bill be made payable to the drawer's own order, and indorsed over by him, *acceptance admits the drawing, but does not admit the indorsement, though the name is the same, and they profess to be written by the same party.*" (Italics ours.)
>
> 2 *Parsons On Notes & Bills*, 591.

See also:

Robinson v. *Yarrow*, 7 Taunt. 455;

Cooper v. *Meyer*, 10 B. & C. 468;

Beeman v. *Duck*, 11 M. & W. 251;

Williams v. *Drexel*, 14 Md. 566.

In all of these cases the holder who purchased the bill after acceptance by the drawee, necessarily made the same argument that is advanced in the case at bar, namely, that the two signatures being in words identical and appearing to be in the same handwriting, and the drawee having means of verification of both signatures at hand, by his

acceptance necessarily represented that both were genuine. It was held by the Court, however, in each case, that the drawee need only consider, and his representation by acceptance only extended to the genuineness of the signature appearing on the *face* of the bill. *A fortiori,* the guarantee, by a holder, of the endorsement cannot be distorted into a representation as to the signature on the *face* of the bill; particularly where the holder cannot be presumed and the drawee *must* be presumed to have ready means of comparing the forged signature with the genuine signature of the ostensible drawer.

Furthermore, it must be borne in mind that from a legal standpoint, the check in the case at bar was not the check of a third party, but purported to be the check of the United States itself, upon itself. The plaintiff is a corporation sovereign and as such can only disburse its funds through and upon the orders of its officers and agents, duly appointed for that purpose. Sumner was a disbursing officer of the United States (Transcript Record, page 16). His check was the check of the United States, and from this standpoint the United States was the purported drawer. This was held in one of the cases chiefly relied upon by the plaintiff.

United States v. *National Bank of Commerce,* 205 Fed. 433, at page 438.

Therefore, when the check was presented for payment it was as if the holder had said to the plaintiff, "Is this your check?" The plaintiff's contention that, even under these circumstances and merely because the holder may have guaranteed the genuineness of the *endorsement,* it should be relieved from the consequences usually attendant upon the acceptance of the signature of another as one's own, is without justice or authority.

POINT II.

Inasmuch as the individual drawing the instrument did not intend that the person named as payee therein should have any interest in it or even possession thereof, such payee was, within the Negotiable Instruments Law, a "fictitious" payee, and hence the instrument was payable to bearer, and the indorsement surplusage.

In many instances where drawees have paid checks or drafts to which the signatures of the drawers were forged, and thereafter sought to recover back from the holders, the courts have reached the same conclusion as in the cases cited under Point I, but upon an alternative ground. These cases are based upon Section 9 of the Uniform Negotiable Instruments Law (in force, during the times herein mentioned, in Vermont, New York and the District of Columbia), which reads as follows:

> "The instrument is payable to bearer; * * *
> 3. When it is payable to the order of a fictitious or non-existing person, and such fact was known *to the person making it so payable.*"

Of course, if the instrument in the case at bar had been expressly and in so many words made payable to bearer, no endorsement would have been necessary to the negotiation thereof, and under such circumstances we assume that our opponent would concede that the general rule laid down in *Price* v. *Neal* would apply.

If, however, as a result of the section of the statute above quoted the instrument was, in legal effect, exactly as if it had been expressly drawn payable to bearer, then the same result would necessarily follow. That we are correct in contending that upon the facts existing in this case the check here involved was, in legal effect, payable to bearer within the terms of Section 9 of said law, and that, in such event, the drawee has no recourse against

the holder after payment upon a forged signature of the drawer, was held below by the Circuit Court of Appeals and is established by the following authorities:

Bank of England v. *Vagliano Bros.*, L. R. (1891) App. Cases, 107;

Trust Company of America v. *Hamilton Bank*, 127 N. Y., App. Div., 515;

Snyder v. Corn Exchange Bank, 221 Pa. St., 599;

Bartlett v. *First National Bank*, 247 Ill., 490;

Phillips v. *Mercantile National Bank*, 140 N. Y., 556;

Clutton v. *Attenborough & Son*, L. R. (1897) App. Cases, 90;

Coggill v. *American Exchange National Bank*, 1 N. Y., 113;

Phillips v. *Thurn*, 18 C. B. (18 J. Scott, N. S.), 694;

Kohn v. *Watkins*, 26 Kans., 691;

Ort. v. *Fowler*, 31 Kans., 478;

Lane v. *Krekle*, 22 Ia., 404-5;

Farnsworth v. *Drake*, 11 Ind., 101;

Blodgett v. *Jackson*, 40 N. H., 21;

Re Assignment of Pendleton Hardware Company, 24 Oregon, 330.

The leading modern authority on this point is *Bank of England* v. *Vagliano Bros.* (*supra*), decided by the House of Lords in 1891. In view of the eminence of the tribunal and the elaborate nature of the opinions, we deem it allowable to digest the facts and quote from the opinion at some length.

The statute under construction in the Vagliano case was practically the same as Section 9 of the Negotiable Instruments Law, except that the latter Act provides that the instrument is payable to bearer when the fictitious character of the payee is "known to the person making it so payable" (in the case at bar, Sergeant Howard, the forger) and in that respect it is, if anything, more favorable to the contention of the defendant than the English

statute. In the case mentioned it appeared that Vagliano Brothers were foreign bankers, doing a large business in various parts of the world. One of their clerks, Glyka, forged a great number of bills of exchange, purporting to be drawn on the firm by one of its foreign correspondents, one Vucina, payable to another well-known firm, C. Petridi & Co. He also forged letters of advice to accompany them and caused them to be presented as genuine bills to Vagliano Brothers in the regular course of business. Vagliano Brothers, deceived by the cleverness of the forgeries, accepted from time to time bills aggregating over $350,000, which they directed the Bank of England, their general banker, to pay when presented. After bills had been accepted, Glyka would obtain possession of them, and endorse thereon the name of the payee and collect the money from the bank, which charged the amounts so paid to the account of Vagliano Brothers. The latter, on discovering the forgeries, sued the Bank to recover the amount so paid out on the forged bills. The House of Lords held, reversing the decision of the lower courts, that this amount could not be recovered. The decision is placed upon the ground that, since Glyka, although he inserted in the forged bills as payee the name of a well-known firm, knew that such firm had no interest in the bills and never intended that it should, the payee was fictitious, and under the statute (Bills of Exchange Act, 1882, Section 7, Subdivision 3), providing that "Where the payee is a fictitious or nonexisting person the bill may be treated as payable to bearer," the bills of exchange were held to be, in legal effect, payable to bearer, and the Bank obtained good title regardless of the endorsements. Lord Halsbury said (p. 121):

> "It seems to me that what the Legislature was enacting was in substance this: That where a bill was not payable to bearer, the person to whom payment was intended to be made was to be named or otherwise indicated upon the face of the instrument

with reasonable certainty; but where there was no real payee, the bill might be treated as payable to bearer. * * *

"If the substance of the matter be looked at, and it is remembered that what the Legislature was dealing with was what was to appear upon the face of the instrument and contemplated a case of there being no one to whom payment could properly be made, no person on the face of the instrument having any rights under the bill, no person, therefore, capable of giving a discharge to the acceptor for having paid at the demand of the drawer, it would seem that the reason of the thing *would apply equally to a real person whose name was forged, as to a person who had no existence*" (italics ours).

Lord Watson, in the course of his opinion in the same case, said (p. 134):

"I think it right to state my own opinion with regard to the construction of Section 7, Subsection 3, of the Bills of Exchange Act, 1882. Upon that point, I concur in the reasoning of my noble and learned friend Lord Herschell. I think that the language of the subsection, taken in its ordinary significance, imports that a bill may be treated as payable to bearer in all cases where the person designated as payee on the face of it is either non-existing or, *being in existence, has not and never was intended to have any right to its contents.* * * * The fact that the payees were fictitious within the meaning of the statute affords a good answer to Vagliano Brothers contention that the bank was bound to deal with these documents on the same footing as if they had been real bills and ought not to have paid except upon genuine indorsations by C. Petridi & Co., (italics ours).

Lord Herschell, in the course of his opinion, said (p. 153):

"I have arrived at the conclusion that, whenever the name inserted as that of the payee is so inserted

by way of pretence merely, *without any intention that payment shall only be made in conformity therewith, the payee is a fictitious person within the meaning of the statute, whether the name be that of an existing person, or of one who has no existence, and that the bill may, in each case, be treated* by a lawful holder as *payable to bearer*" (italics ours).

The *Vagliano* case is particularly strong, since the section of the Bills of Exchange Act therein construed contains substantially the same language as that of Section 9 of our Negotiable Instruments Law, to the effect that a negotiable instrument is payable to bearer when payable to the order of a fictitious or non-existing person, but does not contain the additional provision found in our law to the effect that the same is true when "such fact was known to the person making it so payable." Clearly the words quoted, as was pointed out in the case next discussed, strengthen the defendant's position and have just the contrary effect to that asserted by implication in the plaintiff's brief (p. 17 thereof). The fictitious character of the payee is not required to be known by the purported drawer, but by the "person" making the instrument so payable —in this case Sergeant Howard, the man who actually wrote and signed the check.

Both before and since the decision of the House of Lords in the *Vagliano* case, the courts of New York State followed the same line of reasoning. One of the most recent cases on the subject is

Trust Company of America v. *Hamilton Bank*, 127 *N. Y. App. Div.* (First Depart.), 515.

This case contains every material element which exists in the case at bar, except that the payee and the drawer did not purport to be the same individual, which difference only serves to make it a stronger authority for the defendant in the instant case. In the *Trust Company of America* case, the forger, who drew a check and forged the name of the party purporting to be the maker, made the same payable to an existing payee, but one not intended to have

any interest therein, and endorsed the name of such payee upon the back of the instrument. Thereafter, the instrument was negotiated and came into the hands of the defendant, which presented the check for payment to the plaintiff (the bank upon which it was drawn) guaranteeing the endorsements. The plaintiff paid the check and the Court held that the plaintiff could not recover back the amount thereof from the defendant. The Court, per McLaughlin, J., said (p. 518):

> "If all the endorsements on the checks in question had been genuine, the plaintiff could not recover, but if the maker's signature had been genuine and only the endorsements, or any of them, forged, it could recover. Having paid the checks, the plaintiff cannot now be heard to say that the maker's signatures are not genuine or recover on the ground that the same were forged, and by reason of that fact it is suggested that the rights of the parties are precisely the same as though the drawer's signatures were genuine, and since the defendant never obtained good title to them, on account of the forged endorsements of the payees, the plaintiff is entitled to recover. There are authorities to support this contention. (*First National Bank* v *Northwestern Bank*, 152 Ill., 296; *McCall* v. *Corning*, 3 La. Ann., 409). But it does not necessarily follow, because the checks were not endorsed by the persons whose names appeared on them as payees, that the defendant, which received them in good faith and paid value therefor, can be compelled to repay their amounts to the plaintiff.
>
> "A leading authority on the subject is *Bank of England* v. *Vagliano Bros.* (L. R., 1891, App. Cas., 107), which reversed *Vagliano Bros v. Bank of England* (23 Q. B. Div., 243, and 22 Id., 103). This authority has been freely cited and is directly in point.
>
> • • •
>
> "Some doubt was expressed in the *Bank of England* case as to whether the statute warranted such

construction, since the effect was to make the fictitiousness of the payee depend upon the maker's intention, but under our own statute no such question can be raised. The Negotiable Instruments Law provides (Laws of 1897, Chap. 612, Sec. 28): 'The instrument is payable to bearer. * * * 3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable.'

"The correctness of the decision in *First National Bank* v. *Northwestern Bank* (*supra*), may well be questioned, since the decision of the Lower Court—which was reversed by the House of Lords—in the Bank of England case was cited at length and relied upon. Whether this be so or not, the decisions in our own State are entirely in harmony with the views expressed by the House of Lords. * * *

"Under the Negotiable Instruments Law and the cases cited, I am of the opinion the checks in question, as between plaintiff and defendant, were payable to bearer. It does not appear who forged the makers' signatures, but the subsequent history of the checks does not leave it open to doubt that the person who did so knew that the parties whose names were used as payees would never have any interest in the instruments. Just as in the *Bank of England* and *Phillips* cases, in order to accomplish the fraud more easily, the *names inserted as payees were those of persons to whom checks might naturally be made.* Whether endorsing the names of the payees upon the checks was technically forgery or not, it is unnecessary to consider; it has been convenient to thus describe them. Despite these forged endorsements, then, the defendant acquired good title, since, *in legal effect, the checks were payable to bearer.* Plaintiff having paid them to a holder in due course cannot recover upon the ground that the payees' signatures were forged. * * * I am of the opinion that any equities in the

present case are with the defendant. The risk of paying out money upon the forged signature of a depositor is one which a banker must assume, and if the plaintiff had detected the forgeries when the checks were presented for payment, it would not have suffered any loss, and it is possible that the defendant would not" (italics ours).

One of the leading cases on this subject, decided by the Court of Appeals of New York is

Phillips v. *Mercantile National Bank,* 140 N. Y., 556, in which the Court, per Gray, J., said (p. 562):

"The fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existent person, but upon the intention underlying the act of the maker in inserting the name."

Snyder v. *Corn Exchange National Bank,* 221 Pa., 599, is to the same effect. The Supreme Court of Pennsylvania there held (p. 605):

"By our Negotiable Instruments Act * * * a check is payable to bearer 'when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable.' * * * Niemann may have been an existing person, but he could have been, and was, a fictitious one within the meaning of the Act of Assembly if Greenfield intended to use his name, and did use it, as that of a person who should never receive the checks nor have any right to them. * * * A *fictitious person* within the contemplation of the Act of 1901 *is not merely a non-existing one, for, if so, the word 'non-existing' would have been sufficient without more.* It is clear, then, that when the Legislature declared that a check payable to a 'fictitious or non-existing person' is to be regarded as payable to bearer, it meant a fictitious person to be one who, though named as payee in a check, has no right to it, or the proceeds of it, because the drawer of it so intended, and it, therefore, matters not

whether the name of the payee used by him be that of one living or dead, or of one who never existed" (italics ours).

It is, of course, so obvious as to preclude debate, that when, in the case at bar, Howard, the forger, drew a check, payable to the order of Lieutenant Sumner, to which he forged the latter's signature, and endorsement, and on which he fraudulently procured and converted to his own use the proceeds, he did not intend that Lieutenant Sumner should ever have any title to, or interest in, or even possession of, the instrument.

Within the principle of the decisions cited, therefore, and from which we have quoted, Lieutenant Sumner must be deemed to have been a fictitious payee within the provisions of Section 9 of the Negotiable Instruments Law, which, as is set forth in the stipulation of facts was in effect in Vermont and New York at the time when the transactions in question took place, and which was also in effect, as this Court will judicially recognize, in the District of Columbia.

The Solicitor General in his brief urges that the check, in spite of the provisions of Section 9 of the Negotiable Instruments Law, cannot be considered as payable to bearer, because of the provisions of *R. S. Sec.* 3620, providing that it shall be the duty of disburing officers to draw "only in favor of the person to whom payment is made." He contends, therefore, that Lieut. Sumner was forbidden by this Statute to draw a check payable to bearer, and, upon the assumption that the Howard National Bank was chargeable with knowledge of this limitation upon his authority, that it could acquire no rights against the Government by cashing a check payable to bearer.

The short answer to this contention is, that so far as the Howard National Bank knew, and so far as the face of the check itself disclosed, the latter instrument was *not* payable to bearer, but was payable to and was in favor of a specific person to whom the Bank made payment through his known agent and pay-clerk.

The fact that by operation of law and because of a chain of circumstances, of which the Bank had no knowledge, the check is to be treated as if it were in terms payable to bearer, is, therefore, of not the slightest consequence so far as this Statute is concerned. To contend otherwise necessarily involves the assumption that the Bank is chargeable not only with knowledge of the statute but also of all of the facts, *including the secret fraudulent intent of the forger,* which, by operation of law transformed this check into an instrument payable to the order of a fictitious person. In the face of the conceded absence of any knowledge, or even suspicion on the part of the Bank of these circumstances (*Transcript of Record,* page 21, fol. 35), this contention is so artificial as to preclude the necessity of any further discussion.

As a matter of fact, the actual insertion of the words "or bearer" after the purported payee's name on the face of the check would have constituted no violation of Sec. 3620.

15 Opinions of Atty. Genl. p. 288.

The only authority cited by the plaintiff in its support upon this point is

United States v. *National Bank of Commerce,* 205 Fed., 433.

There are several grounds upon which this case may be properly disregarded as an authority on this point. In the first place, the remarks of the Court on this phase of the case were unnecessary to its decision. Secondly, the signature of the drawer was *genuine*, and was held to be that of the United States. Thirdly, the party asserting the bearer nature of the check was the drawee Bank, which "as a National Depositary" the Court held was chargeable with notice of the limitations of the disbursing officer's authority. Finally, the Court cites no authority in support of its dictum. On the other hand, in the instant case the point was squarely raised below, and the decision of the Circuit Court of Appeals for the Second Circuit that the check was payable to bearer necessarily decided this contention adversely to the United States.

POINT III.

The record fails to disclose any facts sufficient to justify a finding that the Howard National Bank was negligent.

Plaintiff's counsel contends that the defendant, or rather the Howard National Bank in whose shoes he claims the defendant stands, was negligent. We submit that the record utterly fails to show any negligence on the part of the Howard National Bank, but on the contrary does disclose gross negligence on the part of the *plaintiff*.

On what ground does the plaintiff contend that the Howard National Bank was negligent?

Certainly not because the Bank failed to discover that Lieutenant Sumner's signature was forged, since the latter was not one of the Bank's depositors and hence it had no means of making a comparison with his true signature.

There are only two specifications of negligence even suggested in our learned opponent's brief; first, that the Bank should have suspected Howard's authority to cash the check and, second, that it did not require Howard to endorse his own name on the check.

Why *should* the Howard National Bank have suspected Howard's authority to cash this check? It had frequently cashed checks drawn by Sumner as Acting Quartermaster upon the treasurer, which were presumably also payable to his own order since they bore his endorsement (Transcript of Record, page 16, fol. 31). It does not appear in the record whether such checks were cashed by Sumner personally or by Howard in his behalf, or sometimes by one and sometimes by the other. Under any circumstances, however, First Class Sergeant Howard had been acting in the capacity of finance clerk in Sumner's office since the summer of 1913, approximately a year and a half prior to this transaction, his duties being to handle all papers relating to finance that came into the office. He also acted as pay clerk to Lieutenant Sumner and in fact handled all monetary papers concerned in the transactions of the plaintiff's Quartermaster at that post. All of these

facts are stipulated (Transcript of Record, p. 21, fol. 35), as well as the additional fact *that the Howard National Bank knew Sergeant Howard as such clerk* (Id.)

It is further stipulated that not only did the Bank not know, but that it did not even *suspect* any irregularity with respect to the right of Howard to negotiate the check or to receive the proceeds of such negotiation (*id.*, fol. 35).

Under these circumstances how can it be claimed that the Bank was guilty of negligence? Howard was no *stranger* to it, but known to be a trusted employee of the plaintiff, and Sumner's right hand man, one of a few men specially trained for the position which he had occupied at that particular post for approximately eighteen months, and entrusted with the handling of all the monetary papers in that department.

Nor was there anything unusual in cashing such a check over the counter. It was in the precise form which undoubtedly was used for payroll purposes. It would be a perfectly natural thing for the Quartermaster to send his Pay Clerk, rather than to go in person to the Bank to cash the check, and carry back the funds necessary to meet a payroll.

Certainly this Court will not say that under all these circumstances the fact that the Bank cashed the check and gave the money to Howard instead of insisting that the Quartermaster officer appear in person to receive the funds, constituted negligence *as a matter of law,* or, in the absence of other facts, even sufficient evidence to justify such a finding of fact on the part of a jury.

There remains, then, but one other suggestion of negligence on the part of the Howard National Bank, namely: that it did not require Howard to endorse his own name on the back of the check.

The Solicitor General concedes that there is nothing in the Negotiable Instruments Law which required such an endorsement on the part of Howard, but insists that there is a custom of bankers so universal that this Court should take judicial notice of it, requiring a person re-

ceiving payment of a check or draft to endorse his name on it as a form of receipt and as a means of identification (Plaintiff's Brief, p. 8).

There is no such custom pleaded in the complaint nor is there a word in the record to support the existence of such a custom, either of this particular bank or among banks generally in the State of Vermont, or elsewhere. We emphatically dispute the existence of such a custom.

Exactly the same contention was made in the case of

Dedham National Bank v. *Everett National Bank,*
177 Mass. 392,

where a bank cashed a check drawn on another bank in bearer form, presented to it by the clerk of the ostensible drawer, without inquiring as to the genuineness of the signatures or requiring an endorsement. The check having been paid by the bank on which it was drawn in spite of the fact that the drawer's signature was forged, it was held that the drawee bank could not recover from the cashing bank under the circumstances above set forth. In that case counsel for the plaintiff did not presume to ask the court to take judicial notice of any such alleged custom as is contended for here, but sought to prove the existence of such a custom by the testimony of witnesses in accordance with the rules of evidence. The Trial Judge, after stating that the evidence as to the custom was conflicting, held as follows:

> "I am not satisfied that any such custom exists, the usage varying with different banks."
>
> Id., 177 Mass. at bottom of page 393.

Upon review of the case, Mr. Justice Holmes, then Chief Justice of the Supreme Court of Massachusetts, held as follows:

> "The plaintiff attempts to make out that the defendant led the plaintiff to make the payment by requiring no endorsement of the checks, on the ground that its officer was led by that fact to suppose that they were cashed for the man who appeared to have been their maker. The attempt to prove a custom

that would justify such an inference failed, and the judge may not have believed even that the officer was influenced in his conduct by the absence of an indorsement. *But if he was, the evidence did not show any duty on the part of the defendant to anticipate such a result*" (italics ours).

Id. 177 Mass. at page 396.

POINT IV.

Both parties having moved for the direction of a verdict, the exception to the finding of the trial judge in favor of the defendant does not permit the plaintiff to raise the question of the negligence of the Howard National Bank for review by this court upon writ of error.

In the last analysis the argument of the Solicitor General on the question of the alleged negligence of the Howard National Bank amounts to nothing more than a claim that this Court should *infer* such negligence from the mere fact that the bank did not inquire as to Howard's authority and did not require his endorsement. Such an inference, however, is one of fact, peculiarly within the province of a jury, or trial judge in the event of waiver of or other dispensation with a jury.

Wigmore on Evidence, Vol. IV., §2552 (c), p. 3593.

In the case at bar both sides moved for the direction of a verdict (transcript of record, p. 45, fol. 82), without any further request, and a general verdict was directed in favor of the *defendant* (id.). The only exception in the entire record is that taken by the plaintiff to such general verdict (id.).

Under these circumstances we submit that upon review by this court under writ of error the question of the alleged negligence of the Howard National Bank is no longer open.

In *Beuttell* v. *Magone*, 157 U. S., 154, this Court said (p. 157):

"As * * * both parties asked the court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. This was necessarily a request that the court find the facts, and the parties are, therefore, concluded by the findings made by the court, upon which the resulting instruction of law was given. The facts having been thus submitted to the court, we are limited in reviewing its action, to the consideration of the correctness of the findings on the law, and must affirm if there be any evidence in support thereof."

In *Williams* v. *Vreeland,* 250 U. S., 295, Mr. Justice McReynolds, delivering the opinion of this Court, said (p. 298):

"The established rule is, 'Where both parties request a peremptory instruction and do nothing more they thereby assume the facts to be undisputed and, in effect, submit to the trial judge the determination of the inferences proper to be drawn therefrom.' *And upon review, a finding of fact by the trial court under such circumstances must stand if the record discloses substantial evidence to support it.*" (Italics ours.)

See also:

Sena v. *American Turquoise Co.,* 220 U. S., 497; *Bowen* v. *Chase,* 98 U. S., 254.

In passing upon the question as to whether there is any evidence to support the verdict or finding of the court below, this Court will not review such verdict or finding, if it involves mixed questions of law and fact.

In *Martinton* v. *Fairbanks,* 112 U. S., 670.

Mr. Justice Woods, delivering the opinion, said (p. 674):

"The general verdict of a jury concludes mixed questions of law and fact, except so far as they may be saved by some exception which the party has taken to the ruling of the court upon a question of law. * * * But the plaintiff-in-error has taken no such exception.

*By excepting to the general finding of the court, it is in the same position as if it had submitted its case to the jury, and, without any exception taken during the course of the trial, had, upon a return of the general verdict for the plaintiff, embodied in a bill of exceptions all the evidence, and then excepted to the verdict because the evidence did not support it. * * * The general finding is conclusive of the issues of fact against the plaintiff-in-error, and there is no question of law presented by the record of which the court can take cognizance."* (Italics ours.)

See also opinion of Mr. Justice Lurton in *Kentucky Life & Accident Co.* v. *Hamilton,* 63 Fed., 93.

In view of the circumstance that the record contains not only stipulations of ultimate facts, but also of evidentiary facts, and even of what is equivalent to oral testimony of evidentiary facts, as to the inferences from which there is no agreement or special finding, this Court will not weigh such evidence for the purpose of determining whether it might have been sufficient to support a verdict contrary to that actually rendered.

In *Wilson* v. *Merchants' Loan & Trust Co.,* 183 U. S., 121, the Court said (p. 128):

> "Here, although there is a general finding in favor of the defendant, yet there is a statement of facts which contains certain ultimate facts, together with certain other facts, evidential in their nature from which an important and ultimate fact might be inferred, but in regard to which there is no agreement or finding whatever. In such case it would not be proper to regard the agreed statement as a sufficient finding of ultimate facts within the statute."

In *Lehnen* v. *Dickson,* 148 U. S., 71, the Court, discussing a general finding by the trial judge, said (p. 73):

> "We must accept the general finding as conclusive upon all matters of fact, precisely as the verdict of a jury."

See also:

Otoe County v. *Baldwin,* 111 U. S., 1, 12;
Basset v. *United States,* 9 Wall., 38, 40;
Dooley v. *Pease,* 180 U. S., 126, 131.

Furthermore, the Court will conclusively presume not only that all facts have been found in favor of the prevailing party, which might have been so found, but also *that all facts sought to be established by inference or otherwise, by the losing party, have been found against him.*

In *Hepburn* v. *Dubois,* 12 Peters, 345, the Court discussing the rules as to the effect of a jury verdict, said (p. 376):

> "If this court can comprehend what these rules are, or promulgate them in intelligible language, they are these:
>
> "That where the evidence in a cause conduces to prove a fact in issue before a jury, it is competent in law to establish such fact; a jury may infer any fact from such evidence, which the law authorizes a court to infer on a demurrer to the evidence; after a verdict in favor of either party, on the evidence, he has a right to demand of a court of error that they look to the evidence only, for only one purpose, and with the single eye to ascertain whether it was competent in law to authorize the jury to find the facts which make out the right of the party, on a part, or the whole of his case. If, in its judgment, the Appellate Court shall hold that the evidence was competent, then they must found their judgment on all such facts as were legally inferable therefrom; in the same manner and with the same legal results, as if they had been found and definitely set out in a special verdict. *So, on the other hand, the finding of the jury on the whole evidence in a cause, must be taken as negativing all facts, which the party against whom their verdict is given, has attempted to infer from, or establish by the evidence.*" (Italics ours.)

Under the rules laid down by the foregoing authorities it must be presumed, we submit, that the trial court found

against the plaintiff on the issue of alleged negligence on the part of the Howard National Bank. Such a finding is not open to review by this Court, under its decisions above cited.

POINT V.

Even assuming that the Howard National Bank was negligent in cashing the check, such negligence could not be charged to the Defendant Bank, which was a bona fide purchaser for value.

The check in suit was forwarded by the Howard National Bank to the defendant bank not only for collection, but also for deposit to the credit of the account of the former bank, and was so received and credited by the defendant bank, (Transcript of Record, p. 21, 22, fols. 36, 37).

Prior to the discovery of the forgery the defendant bank paid the Howard National Bank various sums of money in excess of the amount to the credit of said bank with the defendant bank at the time of the receipt and credit of the said check, including, in such credit, the amount of the said check (*id.*, p. 22, fol. 37).

No specific or special directions as to the application of this check or any subsequent deposit were given by the Howard National Bank and no special appropriation was made by the defendant bank. (*Id.*)

Under these circumstances, the authorities are clear that the defendant bank became a purchaser for value of the check, even though it always may have had on hand in this account, as a result of *subsequent* deposits, a sum in excess of the amount of the check.

Merchants National Bank v. *Santa Maria Sugar Co.*, 162 App. Div., 248;

National Park Bank v. *Seaboard Bank*, 114 N. Y. 28;

Rickerson Roller-Mill Co. v. *Farrell Foundry & Machine* Co. (C. C. A. 6th Circuit), 75 Fed., 554, (Opinion by Lurton, C. J.)

The Solicitor General argues (page 6, plaintiff's brief) that the defendant bank is in no better position than the Howard National Bank, using the following language:

> "But the law recognizes no such thing as a holder in due course of a negotiable instrument void in its inception because of the forgery of the drawer's signature. Therefore, the defendant merely stood in the shoes of the (Howard National) Bank."

No authorities, however, are cited in support of this statement.

On the other hand, we submit that the law is directly to the contrary, and that the following authorities support our contention:

National Park Bank v. *Ninth National Bank,* 46 N. Y., 77;

Trust Company of America v. *Hamilton Bank,* 127 N. Y. App. Div., 515;

Jones v. *Miners, etc., Bank,* 144 Mo. App., 428; 128 S. W., 829;

Pennington County Bank v. *Moorehead First State Bank,* 110 Minn., 263;

United States v. *Bank of New York,* 219 Fed., 648;

Raphael v. *Bank of England,* 17 C. B., 161.

The argument that, in the event that the plaintiff should succeed in this action, the defendant bank might have recourse against the Howard National Bank upon its endorsement of the check, is of no force. There is no reason in justice or authority why the defendant bank, if it is a *bona fide* holder for value of this check, should be put to the trouble, expense and risk of a law suit against the Howard National Bank, particularly where there is not the vestige of a claim that the *defendant* bank was guilty of any negligence or was in any respect at fault.

No reason is advanced either in the record or in the brief of the plaintiff why it did not *itself* proceed in the first instance against the Howard National Bank, if it considered, as it urges here, that the question of the alleged

negligence of that bank was in itself sufficient to justify a recovery on its part.

POINT VI.

The stipulated facts set forth in the record establish such negligence on the part of the plaintiff as will, irrespective of any other question in this case, preclude its right to recovery. The general verdict directed in favor of the defendant necessarily constituted a finding of such negligence which this court will not disturb upon writ of error.

The issue of negligence on the part of the plaintiff in failing to discover the forgery and notify the defendant thereof to the latter's prejudice, was squarely raised by the clear allegations contained in the defendant's amended answer (transcript of record, p. 10, fols. 18 and 19). We submit that the ultimate facts when taken together with the evidentiary facts admitted by the stipulations (*id.*, 43 to 45, fols. 79 to 81) necessitate the drawing of an inference of such negligence, which inference, because of the direction of a general verdict in favor of the defendant, will be presumed to have been drawn by the Trial Court, and hence will not be reviewed by this Court because of the reasons and authorities set forth at length under Point IV. of this brief and therefore not repeated here.

It is not necessary, however, that the defendant should shelter itself, although fully justified in so doing, behind the verdict of the Trial Court. On the contrary, we welcome the issue raised by the Solicitor General in Point IV of his brief, which asserts that the plaintiff is not barred from recovery by its negligence in failing sooner to discover and notify the bank of the forgery.

It is first asserted by him that the forgery was so well done that it could not be detected by a mere inspection of the drawer's handwriting (plaintiff's brief, p. 20). Our answer to this is that there is not a word on the subject

one way or the other in the record, and therefore we might urge with equal propriety that it was undisputed that a mere inspection of the purported drawer's genuine handwriting would have immediately disclosed the forgery.

His next argument is that the defendant was no worse off than it would have been had the plaintiff delayed paying the check for two weeks, "pending the investigation of the genuineness of the drawer's signature." The most obvious answer to this argument is that if the Treasury Department had failed to honor the check and had notified the defendant that it was conducting an investigation as to the genuineness of the signature, this would necessarily have constituted such warning to the Howard National Bank as would have resulted in immediate action on its part and, probably, as we shall hereafter point out, the apprehension of the forger and the recovery of the proceeds of the fraud.

It is not delay on the part of the United States in *determining* the question of genuineness of which the defendant complains. It is the fact that it did *not* delay in making such determination or exercise reasonable or any other precaution with respect thereto, but, on the contrary, after *actual examination of the signature* (transcript of record, p. 40, fol. 72) and in spite of every opportunity to compare the forged with the genuine signature of the ostensible drawer, it *immediately* determined that the signature was genuine and honored the draft.

In this connection it must not be forgotten that the payment of this check by the United States resulted in an *overdraft* of Lieutenant Sumner's account with it (*id.*, p. 23, fols. 38-39).

This last fact effectually disposes of any argument or inference that the forgery was so well executed that it could not have been reasonably discovered upon examination or comparison. It was the duty of the Treasury representative, *entirely irrespective of the question of forgery*, to have dishonored this draft.

It is apparent, however, that not the slightest diligence

or care of any kind was exercised by the plaintiff, upon the presentation of this check, either in protection of its own interests or in fulfillment of its duty to the presenting holder.

Nor did the subsequent conduct of the plaintiff manifest any greater degree of diligence or care on its part.

Although as above stated, the payment of the check constituted an overdraft in the account of Lieutenant Sumner with the Treasury, the officials of that Department allowed *six days* to elapse before they even *wrote* to Sumner that his account was overdrawn and inquired as to the reason therefor (*id.*, p. 23, fol. 39).

Even then, notwithstanding the obvious fact that, as Disbursing Quartermaster, Lieutenant Sumner was directly responsible to the Treasury Department for the disposition by him of Government funds, the plaintiff supinely accepted for a further period of five days a reply on the part of Lieutenant Sumner to the effect that *he would explain the matter upon the return of his clerk, Howard, who was on furlough* (id. p. 23, fol. 39). Finally, on December 29, *twelve* days after the plaintiff had *received* this forged check, and eleven days after it had *paid* it, its suspicions at last overcame its lethargy to the point of telegraphing Lieutenant Sumner requesting him to "expedite the matter" (id., p. 23, fol. 39). Upon receipt of this telegram, Sumner, for the first time, made an investigation of his papers and accounts, something which he apparently could have done at any time and irrespective of the absence of his clerk, the forger. Result: the forgery was finally discovered. Even then, he did not notify the Howard National Bank of the forgery until two days later, namely, December 31, 1914 (id., p. 23, fol. 39).

That any bank or banking house which conducted its affairs in such a grossly careless and inefficient manner would soon face serious financial loss, if not worse, is apparent to anyone familiar with the vigilant and prompt methods necessarily adopted by such institutions for their

own protection in dealing with overdrafts and irregularities generally.

The Solicitor General apologizes for this extraordinary delay by stating to the Court that the Treasurer of the United States keeps accounts with six thousand disbursing agents and insists that the vast amount of bookkeeping thereby entailed, excuses the conduct of the plaintiff. (Plaintiff's brief, p. 21.)

Inasmuch as he has departed from the record in making this statement, it may not be amiss for us to call to the attention of the court the fact that the next report to the Comptroller of the Currency of the Chase National Bank, the defendant in this suit, will disclose that on December 31, 1919, the latter had 5,753 different depositors. On the same date the Guaranty Trust Co. of New York had 23,286 depositors, and one other State banking institution alone, namely, the Corn Exchange Bank ,had, on December 27th, 1919, not less than *96,701* depositors!

We have no doubt that other leading banks and banking institutions, not only in New York, but even in less populated cities of the United States, have an equal if not a greater number of depositors. There can be no question but that the huge mass of checks drawn every day by various depositors of any one of these institutions necessarily greatly exceeds the comparatively few drafts drawn daily upon the Treasury Department by its Disbursing Officers. Yet, no one of these institutions would be heard in any court to urge its resultant bookkeeping difficulties in exoneration of its negligence, whether in failing to discover a forgery of one of its depositor's signatures or to detect an overdraft, or in omitting to give immediate notice to all concerned of either these or any other irregularities.

That the plaintiff's negligence resulted in prejudice to the defendant is obvious from the facts relating to the forger's (Howard's) movements after cashing the check, which we have more fully set forth in the statement of

facts. Howard did not leave Burlington until the night of December 17, 1914 (transcript of record, p. 44, fol. 79). The forged check having been forwarded to the plaintiff on December 16th and therefore received in the ordinary course on the morning of the 17th, had proper precautions been taken by it and notice of the forgery telegraphed on that day to either Lieutenant Sumner, the Howard National Bank or even the defendant, the forger could have been easily apprehended while still in Burlington and undoubtedly with the proceeds of the fraud still in his possession. Even after his departure, Howard's movements were of the most open nature. The known character and description of his luggage, the presence of his female companion, his hotel registration under his own name, his marriage in Portland, Maine, his visit to his family, all would have rendered his apprehension immediately after notification of the forgery, a comparatively simple matter. Even after plaintiff's unpardonable delay had permitted his escape to Canada, he was easily apprehended there by the detectives of the American Bankers' Association on January 6, 1915, *within four days from the date the defendant first received notice of the forgery.*

Even at the time of his arrest, over three weeks after he had cashed the forged check, he still had in his possession a substantial residuum of the proceeds of this fraud, which was turned over to the plaintiff (id., p. 44, fol. 81).

We are not required, however, to speculate as to whether or not the plaintiff's negligence *actually* prejudiced the defendant, since it is well settled that the law will presume such to have been the fact.

> "As the right to seek and compel restoration and payment from the person committing the forgeries is, in itself, a valuable one, it is sufficient, if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly, and it may be effectively, exercising it."
>
> *Leather Manufacturers Bank* v. *Morgan*, 117 U. S., 96, at p. 115;

See also

Marks v. *Anchor Savings Bank,* 252 Pa., 304, at p. 310;

Gloucester Bank v. *Salem Bank,* 17 Mass., 32.

In the case last cited, Parker, C. J., used the following language (p. 45);

> "It has been said in argument that notice was given to the Salem Bank as soon as the notes were found to be counterfeit, and that an intimation was given as early as the 26th of February that they were questionable. But it was then too late. * * * The defendants then had no means of looking up those from whom they had received the notes, and, although there is no evidence in the case from which it can be ascertained that they could have saved themselves if they had received earlier notice, *the law itself will presume that a change of circumstances had taken place which would justify them in resisting the action*" (italics our).

That the United States enjoys no special privilege in respect to the duties imposed by law upon other holders of or parties to negotiable instruments is well illustrated by the language of the Court in *United States* v. *The Central National Bank,* 6 Fed. 134, where the point involved was as to whether the Treasury Department had given a sufficiently prompt notice of the forgery of the endorsement of a check drawn upon it. The Court held as follows (p. 135):

> "No good reason can be assigned for relieving the Government when dealing with commercial paper, from observance of the rules respecting vigilance which are enforced against individuals. That this view is entertained by the Supreme Court is plainly indicated by the case of *Cooke* v. *U. S.* (91 U. S. 397)."

In *Salas* v. *United States,* 234 Fed., 842, Judge Ward, delivering the opinion of the Circuit Court of Appeals of the Second Circuit said (p. 844):

> "When the United States enters into commercial business, it abandons its sovereign capacity and is to be treated like any other corporation. (*Bank of United States* v. *Planters Bank*, 9 Wheat., 904.)"

The following language by the same Court in the earlier case of *United States* v. *Bank of New York*, 219 Fed., 648, at p. 649, is also pertinent:

> "The number of persons who can have a right to draw bills upon the Government is relatively small, and it should protect itself as do banks and other large corporations against imposition in such cases."

POINT VII.

The authorities upon which plaintiff mainly relies are clearly distinguishable and inapplicable.

Danvers Bank v. *Salem Bank*, 151 Mass. 280 (discussed on page 9 of plaintiff's brief) deserves notice chiefly for for what plaintiff's counsel has omitted to mention. The *important and controlling fact* in that case, upon which the decision of the Court was expressly based, was that the defendant Bank cashed the check involved for *a total stranger, without even requesting identification.* Such omission, it has been held in other cases, constitutes such a failure to take ordinary and necessary precautions, as to impel the Court to throw the loss on the holder, on the ground, among others, that his negligence in failing to retain a clew by which the forger may be followed has contributed to the success of the fraud. Such doctrine, of course, has never been applied where the person presenting the instrument is well known to the cashing Bank, as in the case at bar.

It further appeared in that case, and the trial Judge found, that the endorsement was so apparently in the same handwriting as the name of the payee in the body of the check as to call attention to that circumstance upon inspection.

National Bank v. *Bangs,* 106 Mass. 441 (cited on page 10 of plaintiff's brief) adds a further explanation to the last mentioned case which was based largely upon it. In *National Bank* v. *Bangs,* the drawer's name was forged, it is true, but the *instrument was payable to the defendants who took it from a total stranger without inquiry.* Hence, the Court held and said (p. 445);

> "In the present case the *check* had not gone into circulation and *could not get into circulation until it was endorsed by the defendants* * * * *To the defendants the presentation by a stranger or third party, of a check purporting to be drawn to their own order,* which such third party proposed to negotiate to them for value, *was a transaction which should have aroused their suspicions.* It ought to have put them upon inquiry for explanations; and if *inquiry* had been properly made it *would have disclosed the fraud and prevented its success.*" (Italics ours.)

The other cases cited by plaintiff's counsel on pages 9 and 10 of his brief, as well as on page 11 and 12 thereof, are distinguishable for similar reasons.

The proposition stated by plaintiff at the beginning of the second paragraph on page 16 of its brief, relative to the common law, is wholly inapplicable because, as has been fully shown above, Section 9 of the Uniform Negotiable Instruments Law, providing that an instrument is payable to bearer "when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable," was in full force at the time of the transactions here involved in Vermont, New York, and the District of Columbia. Moreover, the authorities cited by plaintiff's counsel in support of such proposition are not helpful to him.

The first case as cited by him, and the one upon which presumably he principally relies, to wit, *National Bank* v. *Northwestern Bank,* 152 Ill. 296, was based on the decision of the English Court of Appeals in the *Vagliano* case, which was later reversed by the House of Lords, and

has been clearly overruled in principle by the later decision of the same State Court in the case of *Bartlett* v. *First National Bank*, 247 Ill. 490.

The following three cases, viz.,

Seaboard National Bank v. *Bank of America*, 193 N. Y. 26;

Boles v. *Harding*, 201 Mass. 103;

Jordan-Marsh Company v. *National Shawmut Bank*, 201 Mass. 397,

(cited by plaintiff on pages 16 and 17 of its brief) are in no sense authorities in support of plaintiff's contentions. In two of these cases a trusted employee, and in the third, an impostor, fraudulently induced the drawers to sign checks payable to the order of persons designated by the respective wrongdoers, who then forged endorsements of such ostensible payees and cashed the instruments. The person signing such check in each instance, however, namely the drawer, that is, "the person making it so payable," acted in perfectly good faith and really intended that the payee named should actually have the paper and the proceeds thereof.

United States v. *National Bank of Commerce*, 205 Fed. 433; 224 Fed. 679, has heretofore been distinguished in this brief on one point. It may, however, be further distinguished. The checks there involved were cashed for a stranger without requiring his identification. That constituted such negligence in the cashing Bank as in itself justified the result reached by the Court and was manifestly the real ground of its decision (205 Fed. 438).

The cases cited by plaintiff's counsel on pages 22, 23 and 24 of his brief, in so far as they have not heretofore been distinguished, merely support the proposition that, at common law, a depositor in a Bank was under no obligation to make a prompt examination of returned vouchers for the purpose of discovering forgeries. This proposition has no bearing on the case at bar.

POINT VIII.
The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

HENRY ROOT STERN,
Counsel for the Defendant-in-Error.

RUSHMORE, BISBEE & STERN,
Attorneys for Defendant-in-Error.